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Supreme Court, U. S.
FILED
JUL 8 1972
MICHAEL RODAK, JR., CLERK

71-1168

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

STRECKFUS STEAMERS, INC.,
Plaintiff-Petitioner,

CAPT. WM. F. CARROLL, CAPT. CORNELIUS RIEMER, CAPT. HARRY GRIESHABER, THOMAS P. CHAPMAN, THOMAS McKIBBEN, MARVIN CHAPMAN, ARTHUR JACKSON, GEORGE V. JOHNSON, MRS. BETTY SCHWALLER, MRS. LILY COLD, MRS. LUCY FOSTER, WILLIE COLEMAN, JOHN CARROLL, SPENCER T. JONES,
Defendants-Petitioners,

vs.

CITY OF ST. LOUIS and JOHN K. TRAVERS, Collector of the City of St. Louis,
Defendant-Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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To the Supreme Court of Missouri:

The only new question which the attorneys for Defendants-Respondents raise in their Brief in Opposition to Plaintiff-Petitioner and Defendants-Petitioners' Petition for Writ of Certiorari herein is whether or not the Peti-

tion is Defective in that it Prays for a Writ of Certiorari to be Directed to the Missouri Supreme Court rather than the St. Louis Court of Appeals which Rendered the Opinion and Possesses of the Record to be Reviewed on Certiorari hence this Petition should be dismissed.

The argument runs that since the Missouri Supreme Court did not render an opinion in this case, but simply denied petitioners' application for transfer, this did not represent a judgment or the adoption of the opinion of the Court of Appeals, and therefore, the action of the Supreme Court of Missouri cannot be considered an expression of opinion on the merits of the case. Whether defendants-respondents are right or wrong that the transcript of the record is now before the St. Louis Court of Appeals and not the Supreme Court of Missouri is unimportant to the jurisdiction of this Court. As long as defendants-respondents admit, as they do, that the Writ was timely applied, defendants-respondents rely upon the case of **Western Union Telegraph Co. v. Priester**, 276 U.S. 252, 48 S. Ct. 234, 72 L.Ed. 55, for the position that this Petition should be dismissed. In that case, however, out of super abundance of caution, the Petitioners filed two Petitions, one directed to the Supreme Court of Alabama and the other to the Alabama Court of Appeals. Since the court determined that the one that had the record was the Alabama Court of Appeals, it obviously and correctly dismissed the other Petition to the Alabama Supreme Court as stated by this Court at page 258:

> "Through abundance of caution petition filed separate petitions here, which were granted, asking that writs of certiorari be directed respectively to the Court of Appeals and to the Supreme Court. But as the Supreme Court of Alabama, by denying the petition for certiorari, on the face of the record did not pass on the merits, the writ of this Court in number

183 was properly directed to the Court of Appeals, and that in number 189 is dismissed. Norfolk Turnpike Co. v. Virginia, 225 U. S. 264, 269; Western Union Telegraph Co. v. Crovo, 220 U. S. 364; compare Matthews v. Huwe, 269 U. S. 262."

The City seems to think that if a Petitioner asks for the Writ to be directed to a Court which does not hold the records of the proceeding that this Court loses the jurisdiction to issue a Writ. Such is not the case. As early as 1875 (and well before the modern conception of liberality of amendment to conform to rules so as to achieve justice became the lode star of this and other Federal Courts) this court in **Atherton et al. v. Fowler et al.**, 91 U. S. 134, had the following to say at page 146:

"**The citation goes to the parties, and brings them before us.** The writ of error, therefore, is properly 'directed to the court which holds the proceedings as part of its own records, and exercises judicial power over them.' Hunt v. Palas, 4 How. 590. If the highest court of the State retains the record, the writ should go there, as that court can best certify to us the proceedings upon which it has acted and given judgment. As it is the judgment of the highest court that we are to re-examine, we should, if we can, deal directly with that court, and through it, if necessary, upon the inferior tribunals. **It is, perhaps, safe to say that a writ will never be dismissed for want of jurisdiction, because it is directed to the highest court in which a decision was and could be had.** We may not be able in all cases to reach the record by such a writ, and may be compelled to send out another to a different court before our object can be accomplished; but that is no ground for dismissal. We have the right to send there to see if we can obtain what we want." [Emphasis added.]

In **Department of Banking v. Pink**, 317 U. S. 264 this Court again had the procedural question to decide as to which court its Writ should run. At page 267 this court said:

> "It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record physically lodged in the one court or the other, since we have ample power to obtain it from either. Atherton v. Fowler, 91 U. S. 143, 146."

We might add that in this case the question of timelessness was not drawn into question. Assuming the respondent is correct, then probably if a Writ is issued in this case, it should issue to the St. Louis Court of Appeals rather than the Supreme Court. Jurisdiction of this Court to issue a Writ for Certiorari, once the Petition is filed, is not lost if the Writ prays for the issuance to a Court where the record is not lodged for then this Court can direct it to whatever court has the record as long as it is the final judgment of the highest court of the State which has this jurisdiction.

The prayer of the Petition in this case at page 27 specifically states that the **decision of the St. Louis Court of Appeals** decides the question of substance and in a way not in accord with the applicable decisions of this court. It also states that a decision which we claim is wrong as rendered **by the St. Louis Court of Appeals** is a matter of great importance to many carriers not only on the Mississippi but on the Ohio and probably Columbia Rivers. **It is a question which this Supreme Court should finally settle rather than the St. Louis Court of Appeals.**

It is the opinion of the St. Louis Court of Appeals that is challenged and that is clear throughout the Petition. Defendants Petitioners admit it is the final decision of the highest court of the state in this instance. Where the record is lodged is therefore only important in determining to which court the writ should run but that is not jurisdictional.

2. The remainder of respondents' brief contains nothing to bolster the obviously erroneous opinion of the St. Louis Court of Appeals and no new cases are contained therein not already in the opinion. Consequently, it requires no reply.

Respectfully submitted

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